THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0599, State of New Hampshire v. Olga Cook, the court on August 31, 2007, issued the following order:

The defendant appeals her conviction for driving while intoxicated (DWI) following trial in the Franklin District Court (Gordon, J.). She argues that the trial court erred in denying her motion to suppress preliminary breath test (PBT) results. She also seeks a reversal on grounds that the court based its finding of guilt upon faulty evidence. We affirm.

When reviewing a trial court's ruling on a motion to suppress, we accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. State v. Johnston, 150 N.H. 448, 451 (2004). Our review of the trial court's legal conclusions, however, is de novo. Id.

The defendant argues that the trial court erred in denying her motion to suppress evidence resulting from an illegally extended traffic stop. She claims that the trooper's request that she remove her sunglasses extended the scope of the stop beyond its initial justification. The trooper stopped the defendant because of a report of her erratic driving, his own observations of her driving, and her broken tail light. During his initial encounter with the defendant, he observed "excited, . . . fidgety" behavior and a strong perfume scent. This, coupled with his previous knowledge, justified his request. See State v. Prax, 686 N.W.2d 45, 49 (Minn. Ct. App. 2004) ("anxious, fidgety behavior" is an "indicia of intoxication"); State v. Kornacki, No. 2004-078-00284-I, 2006 WL 2135799, at *1 (N.J. Super. Ct. App. Div. Aug 2, 2006) (citing use of perfume and cologne to mask scent of alcohol). If a question is reasonably related to the purpose of the stop, then no constitutional violation occurs. State v. McKinnon-Andrews, 151 N.H. 19, 25 (2004).

The defendant also argues that the court improperly admitted the PBT results conducted pursuant to RSA 265:92-a (2004) because the trooper misled her about her legal right to refuse the test. Upon establishing what the trial court recognized as probable cause to arrest the defendant, the trooper asked her to consent to a PBT and informed her that if she did not comply, he would require her to go to a nearby

police station for a breath test. We agree with the trial court that the trooper had sufficient probable cause to arrest the defendant. Had she been arrested and taken to a station, she would likely have been administered a breath test. See State v. Barkus, 152 N.H. 701, 708 (2005) (holding that drivers arrested for driving under the influence have no constitutional right to refuse breath test). Accordingly, his instruction was not misleading.

Finally, the defendant argues that the trial judge committed an unsustainable exercise of discretion in basing the guilty finding, in part, upon an erroneous determination that, during her testimony, the defendant admitted to drinking. The State invokes the harmless error doctrine, arguing that "[t]he court's remark that the defendant had 'conceded' drinking was meaningless in view of the overwhelming evidence of guilt."

> It is well settled that an error is harmless only if it is determined, beyond a reasonable doubt, that the verdict was not affected by the error. The State bears the burden of proving that an error is harmless. An error may be harmless beyond a reasonable doubt if the alternative evidence of a defendant's guilt is of an overwhelming nature, quantity or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt.

State v. Pseudae, 154 N.H. 196, 202 (2006) (citations omitted).

We conclude that the State has met its burden of proving harmless error. The defendant registered a .15 blood alcohol content on her PBT. The witness who notified the police of the defendant's erratic driving testified that she saw the defendant "weaving in and out of traffic, from one lane to another, into the breakdown lane." The defendant also failed three field sobriety tests. She scored six out of six on the horizontal gaze nystagmus test, failed to maintain heel-to-toe contact, turned incorrectly, and miscounted on the walk-and-turn test. She also set her foot down, used her arms for balance, and swayed on the one-leg stand test. The trooper noted her fidgety behavior and her red and watery eyes. Given the totality of the circumstances, we hold that without considering the erroneous admission of the defendant's drinking, the evidence was sufficient beyond a reasonable doubt to convict her. Accordingly, we affirm.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk